

1  
2  
3  
4  
5  
6  
7  
8 The Honorable Jamal N. Whitehead  
9  
10

11  
12  
13 UNITED STATES DISTRICT COURT  
14 WESTERN DISTRICT OF WASHINGTON  
15  
16

17 B&G FOOD NORTH AMERICA, INC.,

18 Plaintiff,

19 v.

20 KIM EMBRY and ENVIRONMENTAL  
21 HEALTH ADVOCATES, INC, acting as  
22 enforcement representatives under California  
23 Proposition 65 on behalf of the State of  
24 California,

25 Defendants.

26 Case No. 2:24-MC-00014-JNW

27  
28  
29  
30 **INSTITUTE FOR ENVIRONMENTAL  
31 HEALTH, INC.’S OPPOSITION TO  
32 PLAINTIFF’S MOTION TO ENFORCE  
33 SUBPOENA**

34  
35 **INTRODUCTION**

36  
37 The Institute for Environmental Health, Inc. (“IEH”) provides independent laboratory  
38 testing services.<sup>1</sup> Although it started in Seattle in 2000 with a single laboratory, it now has more  
39 than one hundred locations and operates in countries throughout the world. Its clients include  
40 some of the biggest companies in the food industry. It has previously performed testing services  
41 for both plaintiff and defendants.

42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57  
58  
59  
60  
61  
62  
63  
64  
65  
66  
67  
68  
69  
70  
71  
72  
73  
74  
75  
76  
77  
78  
79  
80  
81  
82  
83  
84  
85  
86  
87  
88  
89  
90  
91  
92  
93  
94  
95  
96  
97  
98  
99  
100  
101  
102  
103  
104  
105  
106  
107  
108  
109  
110  
111  
112  
113  
114  
115  
116  
117  
118  
119  
120  
121  
122  
123  
124  
125  
126  
127  
128  
129  
130  
131  
132  
133  
134  
135  
136  
137  
138  
139  
140  
141  
142  
143  
144  
145  
146  
147  
148  
149  
150  
151  
152  
153  
154  
155  
156  
157  
158  
159  
160  
161  
162  
163  
164  
165  
166  
167  
168  
169  
170  
171  
172  
173  
174  
175  
176  
177  
178  
179  
180  
181  
182  
183  
184  
185  
186  
187  
188  
189  
190  
191  
192  
193  
194  
195  
196  
197  
198  
199  
200  
201  
202  
203  
204  
205  
206  
207  
208  
209  
210  
211  
212  
213  
214  
215  
216  
217  
218  
219  
220  
221  
222  
223  
224  
225  
226  
227  
228  
229  
230  
231  
232  
233  
234  
235  
236  
237  
238  
239  
240  
241  
242  
243  
244  
245  
246  
247  
248  
249  
250  
251  
252  
253  
254  
255  
256  
257  
258  
259  
260  
261  
262  
263  
264  
265  
266  
267  
268  
269  
270  
271  
272  
273  
274  
275  
276  
277  
278  
279  
280  
281  
282  
283  
284  
285  
286  
287  
288  
289  
290  
291  
292  
293  
294  
295  
296  
297  
298  
299  
300  
301  
302  
303  
304  
305  
306  
307  
308  
309  
310  
311  
312  
313  
314  
315  
316  
317  
318  
319  
320  
321  
322  
323  
324  
325  
326  
327  
328  
329  
330  
331  
332  
333  
334  
335  
336  
337  
338  
339  
340  
341  
342  
343  
344  
345  
346  
347  
348  
349  
350  
351  
352  
353  
354  
355  
356  
357  
358  
359  
360  
361  
362  
363  
364  
365  
366  
367  
368  
369  
370  
371  
372  
373  
374  
375  
376  
377  
378  
379  
380  
381  
382  
383  
384  
385  
386  
387  
388  
389  
390  
391  
392  
393  
394  
395  
396  
397  
398  
399  
400  
401  
402  
403  
404  
405  
406  
407  
408  
409  
410  
411  
412  
413  
414  
415  
416  
417  
418  
419  
420  
421  
422  
423  
424  
425  
426  
427  
428  
429  
430  
431  
432  
433  
434  
435  
436  
437  
438  
439  
440  
441  
442  
443  
444  
445  
446  
447  
448  
449  
450  
451  
452  
453  
454  
455  
456  
457  
458  
459  
460  
461  
462  
463  
464  
465  
466  
467  
468  
469  
470  
471  
472  
473  
474  
475  
476  
477  
478  
479  
480  
481  
482  
483  
484  
485  
486  
487  
488  
489  
490  
491  
492  
493  
494  
495  
496  
497  
498  
499  
500  
501  
502  
503  
504  
505  
506  
507  
508  
509  
510  
511  
512  
513  
514  
515  
516  
517  
518  
519  
520  
521  
522  
523  
524  
525  
526  
527  
528  
529  
530  
531  
532  
533  
534  
535  
536  
537  
538  
539  
540  
541  
542  
543  
544  
545  
546  
547  
548  
549  
550  
551  
552  
553  
554  
555  
556  
557  
558  
559  
560  
561  
562  
563  
564  
565  
566  
567  
568  
569  
570  
571  
572  
573  
574  
575  
576  
577  
578  
579  
580  
581  
582  
583  
584  
585  
586  
587  
588  
589  
590  
591  
592  
593  
594  
595  
596  
597  
598  
599  
600  
601  
602  
603  
604  
605  
606  
607  
608  
609  
610  
611  
612  
613  
614  
615  
616  
617  
618  
619  
620  
621  
622  
623  
624  
625  
626  
627  
628  
629  
630  
631  
632  
633  
634  
635  
636  
637  
638  
639  
640  
641  
642  
643  
644  
645  
646  
647  
648  
649  
650  
651  
652  
653  
654  
655  
656  
657  
658  
659  
660  
661  
662  
663  
664  
665  
666  
667  
668  
669  
670  
671  
672  
673  
674  
675  
676  
677  
678  
679  
680  
681  
682  
683  
684  
685  
686  
687  
688  
689  
690  
691  
692  
693  
694  
695  
696  
697  
698  
699  
700  
701  
702  
703  
704  
705  
706  
707  
708  
709  
710  
711  
712  
713  
714  
715  
716  
717  
718  
719  
720  
721  
722  
723  
724  
725  
726  
727  
728  
729  
730  
731  
732  
733  
734  
735  
736  
737  
738  
739  
740  
741  
742  
743  
744  
745  
746  
747  
748  
749  
750  
751  
752  
753  
754  
755  
756  
757  
758  
759  
759  
760  
761  
762  
763  
764  
765  
766  
767  
768  
769  
770  
771  
772  
773  
774  
775  
776  
777  
778  
779  
779  
780  
781  
782  
783  
784  
785  
786  
787  
788  
789  
789  
790  
791  
792  
793  
794  
795  
796  
797  
798  
799  
800  
801  
802  
803  
804  
805  
806  
807  
808  
809  
809  
810  
811  
812  
813  
814  
815  
816  
817  
818  
819  
819  
820  
821  
822  
823  
824  
825  
826  
827  
828  
829  
829  
830  
831  
832  
833  
834  
835  
836  
837  
838  
839  
839  
840  
841  
842  
843  
844  
845  
846  
847  
848  
849  
849  
850  
851  
852  
853  
854  
855  
856  
857  
858  
859  
859  
860  
861  
862  
863  
864  
865  
866  
867  
868  
869  
869  
870  
871  
872  
873  
874  
875  
876  
877  
878  
879  
879  
880  
881  
882  
883  
884  
885  
886  
887  
888  
889  
889  
890  
891  
892  
893  
894  
895  
896  
897  
898  
899  
900  
901  
902  
903  
904  
905  
906  
907  
908  
909  
909  
910  
911  
912  
913  
914  
915  
916  
917  
918  
919  
919  
920  
921  
922  
923  
924  
925  
926  
927  
928  
929  
929  
930  
931  
932  
933  
934  
935  
936  
937  
938  
939  
939  
940  
941  
942  
943  
944  
945  
946  
947  
948  
949  
949  
950  
951  
952  
953  
954  
955  
956  
957  
958  
959  
959  
960  
961  
962  
963  
964  
965  
966  
967  
968  
969  
969  
970  
971  
972  
973  
974  
975  
976  
977  
978  
979  
979  
980  
981  
982  
983  
984  
985  
986  
987  
988  
989  
989  
990  
991  
992  
993  
994  
995  
996  
997  
998  
999  
1000  
1001  
1002  
1003  
1004  
1005  
1006  
1007  
1008  
1009  
1009  
1010  
1011  
1012  
1013  
1014  
1015  
1016  
1017  
1018  
1019  
1019  
1020  
1021  
1022  
1023  
1024  
1025  
1026  
1027  
1028  
1029  
1029  
1030  
1031  
1032  
1033  
1034  
1035  
1036  
1037  
1038  
1039  
1039  
1040  
1041  
1042  
1043  
1044  
1045  
1046  
1047  
1048  
1049  
1049  
1050  
1051  
1052  
1053  
1054  
1055  
1056  
1057  
1058  
1059  
1059  
1060  
1061  
1062  
1063  
1064  
1065  
1066  
1067  
1068  
1069  
1069  
1070  
1071  
1072  
1073  
1074  
1075  
1076  
1077  
1078  
1079  
1079  
1080  
1081  
1082  
1083  
1084  
1085  
1086  
1087  
1088  
1089  
1089  
1090  
1091  
1092  
1093  
1094  
1095  
1096  
1097  
1098  
1099  
1099  
1100  
1101  
1102  
1103  
1104  
1105  
1106  
1107  
1108  
1109  
1109  
1110  
1111  
1112  
1113  
1114  
1115  
1116  
1117  
1118  
1119  
1119  
1120  
1121  
1122  
1123  
1124  
1125  
1126  
1127  
1128  
1129  
1129  
1130  
1131  
1132  
1133  
1134  
1135  
1136  
1137  
1138  
1139  
1139  
1140  
1141  
1142  
1143  
1144  
1145  
1146  
1147  
1148  
1149  
1149  
1150  
1151  
1152  
1153  
1154  
1155  
1156  
1157  
1158  
1159  
1159  
1160  
1161  
1162  
1163  
1164  
1165  
1166  
1167  
1168  
1169  
1169  
1170  
1171  
1172  
1173  
1174  
1175  
1176  
1177  
1178  
1179  
1179  
1180  
1181  
1182  
1183  
1184  
1185  
1186  
1187  
1188  
1189  
1189  
1190  
1191  
1192  
1193  
1194  
1195  
1196  
1197  
1198  
1199  
1199  
1200  
1201  
1202  
1203  
1204  
1205  
1206  
1207  
1208  
1209  
1209  
1210  
1211  
1212  
1213  
1214  
1215  
1216  
1217  
1218  
1219  
1219  
1220  
1221  
1222  
1223  
1224  
1225  
1226  
1227  
1228  
1229  
1229  
1230  
1231  
1232  
1233  
1234  
1235  
1236  
1237  
1238  
1239  
1239  
1240  
1241  
1242  
1243  
1244  
1245  
1246  
1247  
1248  
1249  
1249  
1250  
1251  
1252  
1253  
1254  
1255  
1256  
1257  
1258  
1259  
1259  
1260  
1261  
1262  
1263  
1264  
1265  
1266  
1267  
1268  
1269  
1269  
1270  
1271  
1272  
1273  
1274  
1275  
1276  
1277  
1278  
1279  
1279  
1280  
1281  
1282  
1283  
1284  
1285  
1286  
1287  
1288  
1289  
1289  
1290  
1291  
1292  
1293  
1294  
1295  
1296  
1297  
1298  
1299  
1299  
1300  
1301  
1302  
1303  
1304  
1305  
1306  
1307  
1308  
1309  
1309  
1310  
1311  
1312  
1313  
1314  
1315  
1316  
1317  
1318  
1319  
1319  
1320  
1321  
1322  
1323  
1324  
1325  
1326  
1327  
1328  
1329  
1329  
1330  
1331  
1332  
1333  
1334  
1335  
1336  
1337  
1338  
1339  
1339  
1340  
1341  
1342  
1343  
1344  
1345  
1346  
1347  
1348  
1349  
1349  
1350  
1351  
1352  
1353  
1354  
1355  
1356  
1357  
1358  
1359  
1359  
1360  
1361  
1362  
1363  
1364  
1365  
1366  
1367  
1368  
1369  
1369  
1370  
1371  
1372  
1373  
1374  
1375  
1376  
1377  
1378  
1379  
1379  
1380  
1381  
1382  
1383  
1384  
1385  
1386  
1387  
1388  
1389  
1389  
1390  
1391  
1392  
1393  
1394  
1395  
1396  
1397  
1398  
1399  
1399  
1400  
1401  
1402  
1403  
1404  
1405  
1406  
1407  
1408  
1409  
1409  
1410  
1411  
1412  
1413  
1414  
1415  
1416  
1417  
1418  
1419  
1419  
1420  
1421  
1422  
1423  
1424  
1425  
1426  
1427  
1428  
1429  
1429  
1430  
1431  
1432  
1433  
1434  
1435  
1436  
1437  
1438  
1439  
1439  
1440  
1441  
1442  
1443  
1444  
1445  
1446  
1447  
1448  
1449  
1449  
1450  
1451  
1452  
1453  
1454  
1455  
1456  
1457  
1458  
1459  
1459  
1460  
1461  
1462  
1463  
1464  
1465  
1466  
1467  
1468  
1469  
1469  
1470  
1471  
1472  
1473  
1474  
1475  
1476  
1477  
1478  
1479  
1479  
1480  
1481  
1482  
1483  
1484  
1485  
1486  
1487  
1488  
1489  
1489  
1490  
1491  
1492  
1493  
1494  
1495  
1496  
1497  
1498  
1499  
1499  
1500  
1501  
1502  
1503  
1504  
1505  
1506  
1507  
1508  
1509  
1509  
1510  
1511  
1512  
1513  
1514  
1515  
1516  
1517  
1518  
1519  
1519  
1520  
1521  
1522  
1523  
1524  
1525  
1526  
1527  
1528  
1529  
1529  
1530  
1531  
1532  
1533  
1534  
1535  
1536  
1537  
1538  
1539  
1539  
1540  
1541  
1542  
1543  
1544  
1545  
1546  
1547  
1548  
1549  
1549  
1550  
1551  
1552  
1553  
1554  
1555  
1556  
1557  
1558  
1559  
1559  
1560  
1561  
1562  
1563  
1564  
1565  
1566  
1567  
1568  
1569  
1569  
1570  
1571  
1572  
1573  
1574  
1575  
1576  
1577  
1578  
1579  
1579  
1580  
1581  
1582  
1583  
1584  
1585  
1586  
1587  
1588  
1589  
1589  
1590  
1591  
1592  
1593  
1594  
1595  
1596  
1597  
1598  
1599  
1599  
1600  
1601  
1602  
1603  
1604  
1605  
1606  
1607  
1608  
1609  
1609  
1610  
1611  
1612  
1613  
1614  
1615  
1616  
1617  
1618  
1619  
1619  
1620  
1621  
1622  
1623  
1624  
1625  
1626  
1627  
1628  
1629  
1629  
1630  
1631  
1632  
1633  
1634  
1635  
1636  
1637  
1638  
1639  
1639  
1640  
1641  
1642  
1643  
1644  
1645  
1646  
1647  
1648  
1649  
1649  
1650  
1651  
1652  
1653  
1654  
1655  
1656  
1657  
1658  
1659  
1659  
1660  
1661  
1662  
1663  
1664  
1665  
1666  
1667  
1668  
1669  
1669  
1670  
1671  
1672  
1673  
1674  
1675  
1676  
1677  
1678  
1679  
1679  
1680  
1681  
1682  
1683  
1684  
1685  
1686  
1687  
1688  
1689  
1689  
1690  
1691  
1692  
1693  
1694  
1695  
1696  
1697  
1698  
1699  
1699  
1700  
1701  
1702  
1703  
1704  
1705  
1706  
1707  
1708  
1709  
1709  
1710  
1711  
1712  
1713  
1714  
1715  
1716  
1717  
1718  
1719  
1719  
1720  
1721  
1722  
1723  
1724  
1725  
1726  
1727  
1728  
1729  
1729  
1730  
1731  
1732  
1733  
1734  
1735  
1736  
1737  
1738  
1739  
1739  
1740  
1741  
1742  
1743  
1744  
1745  
1746  
1747  
1748  
1749  
1749  
1750  
1751  
1752  
1753  
1754  
1755  
1756  
1757  
1758  
1759  
1759  
1760  
1761  
1762  
1763  
1764  
1765  
1766  
1767  
1768  
1769  
1769  
1770  
1771  
1772  
1773  
1774  
1775  
1776  
1777  
1778  
1779  
1779  
1780  
1781  
1782  
1783  
1784  
1785  
1786  
1787  
1788  
1789  
1789  
1790  
1791  
1792  
1793  
1794  
1795  
1796  
1797  
1798  
1799  
1799  
1800  
1801  
1802  
1803  
1804  
1805  
1806  
1807  
1808  
1809  
1809  
1810  
1811  
1812  
1813  
1814  
1815  
1816  
1817  
1818  
1819  
1819  
1820  
1821  
1822  
1823  
1824  
1825  
1826  
1827  
1828  
1829  
1829  
1830  
1831  
1832  
1833  
1834  
1835  
1836  
1837  
1838  
1839  
1839  
1840  
1841  
1842  
1843  
1844  
1845  
1846  
1847  
1848  
1849  
1849  
1850  
1851  
1852  
1853  
1854  
1855  
1856  
1857  
1858  
1859  
1859  
1860  
1861  
1862  
1863  
1864  
1865  
1866  
1867  
1868  
1869  
1869  
1870

1 Plaintiff B&G Foods North America, Inc.’s (“B&G) faulty premise that IEH would  
 2 jeopardize its credibility and falsify results for defendants finds no room in logic – or *any*  
 3 evidence – yet Plaintiff continues to disparage IEH with baseless attacks in its pleadings,  
 4 including those before this Court. Though this case has been ongoing since 2020, all of the  
 5 assertions made against IEH are premised on B&G’s self-serving allegations to try to construct  
 6 some “sham” litigation theory against defendants. But the documents IEH has in its possession –  
 7 and has produced – do not support such a theory.

8 IEH has complied with the subpoena. IEH conducted a reasonably diligent search for the  
 9 material requested, produced the responsive material it found, conferred with B&G to explain its  
 10 production, and has offered its corporate designee for deposition on three separate occasions –  
 11 which B&G cancelled (wasting IEH’s time and effort in preparation). The wrongheaded notion  
 12 that IEH is withholding “hundreds of documents” – or is otherwise engaged in some nefarious  
 13 scheme with defendants – is false. B&G’s motion should be denied.

14 As B&G has engaged in extensive discovery motion practice in this matter against  
 15 defendants and other non-parties, the Magistrate Judge in the Eastern District of California  
 16 overseeing this matter (the Honorable Deborah Barnes) is well versed in the substantive nature of  
 17 this dispute and B&G’s conduct in discovery.<sup>2</sup> Indeed, B&G has already filed a motion against  
 18 IEH in that forum – a motion Judge Barnes denied. IEH recognizes the judicial economy in  
 19

20  
 21  
 22  
 23  
 24  
 25  
 26

---

<sup>2</sup> After denying numerous discovery motions filed by B&G, Judge Barnes made clear B&G “should be prepared for an award of monetary sanctions” if it files another “unmeritorious discovery motion.” *B&G Foods North America, Inc. v. Kim Embry and Environmental Health Advocates, Inc.*, No. 2:20-cv-00526-KM-DB (E.D. Cal.) (the “Action”), Dkt. 164 at fn. 5.

1 transferring this matter to the Eastern District of California for consideration and provides its  
2 consent to do so if this Court deems appropriate.<sup>3</sup>

3 **I. STATEMENT OF FACTS<sup>4</sup>**

4 **A. IEH's Relationship to the Parties**

5 IEH tested approximately 380 products for Defendants in this matter in 2018 and 2019  
6 for acrylamide.<sup>5</sup> As part of the process, defendants filled out sample submission forms along  
7 with the products they would like to be tested. *See id.* On a few occasions, defendants emailed  
8 questions regarding the tests. *See id.* After conducting each test, IEH provided a certificate of  
9 analysis detailing the results. *See id.* Without further instruction from a client, IEH disposes of  
10 the samples it tests approximately two weeks after it issues a certificate of analysis. *See id.*  
11 Following this policy, IEH disposed of all samples it tested for defendants. *See id.* IEH was not  
12 engaged by defendants for any other purpose. *See id.*

13 In 2020, recognizing that defendants had an outstanding balance, IEH sent a demand  
14 letter to defendants demanding they pay the outstanding sum owed. IEH communicated with  
15 defendants regarding this debt. *See id.* at ¶18.

16 In 2021, IEH received a subpoena from B&G who was defendant in a state court  
17 proceeding in California (where defendants in the Action were the plaintiff). IEH produced  
18

22  
23 <sup>3</sup> IEH's Motion to Consent to Transfer this matter pursuant to Fed. R. Civ. Proc. Rule 45(f) ("Motion to  
24 Consent") is being filed contemporaneous to this filing. That motion is set for consideration on April 12,  
25 2024.

<sup>4</sup> IEH incorporates facts asserted in its Motion to Consent to any extent they are not stated herein.

<sup>5</sup> *See* Declaration of David E. Crowe in Opposition to Plaintiff's Motion to Enforce Subpoena and in  
26 Support of IEH's Motion to Consent to Transfer ("Crowe Decl.") at ¶11.

1 documents to B&G pursuant to that subpoena and communicated with both B&G and defendants  
 2 regarding that subpoena. *See id.* at ¶19.

3 On June 16, 2023, defendants notified IEH that they had received notice that IEH would  
 4 receive a subpoena in this action. *See id.* at ¶2. IEH has had numerous communications with  
 5 both defendants and B&G due to that subpoena. *See id.* After Judge Barnes denied a motion  
 6 related to B&G's first subpoena, B&G issued the subpoena on which it now requests this Court's  
 7 enforcement. *See id.* at ¶4.

## 9 **B. Discovery Produced by IEH in the Action**

10 On November 7, 2023, IEH was served a subpoena which included 37 requests for  
 11 documents and 37 topics for deposition. *See id.* The subpoena sought compliance for  
 12 documents on November 29, 2023 and for deposition on December 1, 2023 (Plaintiff later  
 13 agreeing to December 7). *See id.*; **Exhibit 4**.

14 On November 20, 2023, IEH provided its objections and notified Plaintiff it would be  
 15 able to provide documents at the location stated in the subpoena by November 29. *See id.* at ¶5.

16 IEH mailed documents responsive to the subpoena on November 24, 2023 and they were  
 17 received on November 27, 2023. *See id.* That production included:

- 18 • emails between IEH's laboratory staff and defendants related to the testing IEH  
 19 conducted;
- 20 • emails between IEH and defendants related to the billing dispute;
- 21 • emails between IEH and the parties regarding the California state court action;
- 22 • emails between IEH and the parties relating to the Action;
- 23 • a 19 page document detailing IEH's Standard Operating Procedures for testing for  
 24 acrylamide;
- 25 • a 9 page document detailing IEH's policies and procedures for sample receipt, login  
 26 and shipping;

- 1 a copy of IEH's certificate of accreditation from the ANSI National Accreditation  
2 Board regarding the testing at issue (in its November 20 letter – IEH also directed  
3 B&G to where to find IEH's other accreditations on its website);  
4
- 5 the Certificate of Analysis report that included the testing done on Plaintiff's  
6 product at issue;  
7
- 8 invoices for testing IEH previously performed for Plaintiff;  
9
- 9 invoices sufficient to show the price IEH charged for its acrylamide testing;<sup>6</sup>  
10
- 10 an excel spreadsheet which detailed the quantitative analysis performed on the  
11 testing on Plaintiff's product; and  
12
- 12 three excel spreadsheets which provided summary of data for the testing conducted  
13 for defendants. The three excel spreadsheets for each test conducted by IEH for  
14 defendants details numerous items including the customer, the test performed, test  
15 method used, the test result<sup>7</sup>, the lab analyst performing the test, the date the sample  
16 was received, the description of the sample, the analysis date, and the condition of  
17 the sample when received.

18  
19 *See id.* at ¶6.

20 On the December 6, 2023, ***Plaintiff cancelled the deposition scheduled*** for the next day.

21 *See id.* at ¶7 and **Exhibit 5**.

22 On December 13, Plaintiff emailed IEH re its production. *See id.* at ¶8 and **Exhibit 6**. In  
23 this email, B&G indicated it believed invoices were "agreements". Given this definition of  
24 "agreement" IEH supplemented its production. *See id.* at ¶9. IEH mailed its supplemental  
25 production on December 18. *See id.* and **Exhibit 7**. It was received on December 22. The  
26 documents IEH produced included:

- 21 all of the invoices IEH issued to defendants;
- 22 a few emails related to those invoices,

---

23  
24 <sup>6</sup> In assessing the undue burden placed on IEH by B&G, it is notable IEH was only paid \$220 for its  
25 services related to the testing of Plaintiff's product at issue in this Action.

25 <sup>7</sup> In reviewing any of the three spreadsheets it is clear that IEH's test results had items with low levels of  
26 acrylamide and items with higher levels of acrylamide. Of course if IEH was inflating its testing as B&G  
outrageously alleges, there would not be tests with low levels.

1       • all of the Certificate of Analysis forms IEH provided to defendants covering all  
2       testing;  
3       • all of the Sample Submission forms IEH had relating to defendants.

4       *See id.*

5       On December 20, IEH through its counsel David Crowe met and conferred with Chelsea  
6       Tirgardoona and Eric Schlabs who represented B&G.<sup>8</sup> IEH detailed the supplemental documents  
7       it had mailed to B&G and explained the steps of its testing process. *See id.* IEH explained that it  
8       often did not know where a product originates when it performs testing. It is up to the client to  
9       describe the material and IEH provides the client its results.<sup>9</sup> Accordingly, IEH could not easily  
10      identify if it had tested other products from B&G outside of that was provided by defendants.  
11      IEH confirmed it did search for such documents (although it being unclear how such testing  
12      could possibly relate to the allegations of the Action). *See id.* After the conference it seemed  
13      B&G was satisfied with the responses it received. *See id.* at ¶11.

15      On December 21, 2023, B&G issued another subpoena setting the deposition as agreed  
16      for January 17, 2024. *See id.* at ¶12 and **Exhibit 10**. On January 9, 2024, **B&G cancelled the**  
17      **second scheduled deposition.** *See id.* at ¶14 and **Exhibit 12**.

18      IEH agreed to another deposition date of February 8, 2024. *See id.* at ¶15. B&G noted  
19      the deposition on January 16, 2024. *See id.* On February 5, 2024, **B&G cancelled the third**  
20      **scheduled deposition.** *See id.* at ¶16 and **Exhibit 13**.

22  
23  
24  
25      <sup>8</sup> *See id.* at ¶10. If Mr. David Kwasniewski was on that call, he did not announce himself. *See id.*

26      <sup>9</sup> For example, if a client wished to test a number of green beans from different producers it may not wish  
to have IEH know which green bean is which.

*IEH has been prepared to be deposed on three separate occasions – B&G has cancelled each agreed to date.*

## II. ARGUMENT

As a non-party, IEH is entitled to greater protection from discovery burdens than a party to the Action. *See Dart Indus. Co. v. Westwood Chem. Co.*, 649 F.2d. 646, 649 (9th Cir. 1980); *Rollins v. Traylor Bros., Inc.*, 2017 WL 1756576 at \*1 (W.D. Wash. May 5, 2017) (“[D]iscovery against a nonparty is more limited than the liberal discovery against parties.”); *Kim v. NuVasive, Inc.*, 2011 WL 3844106 at \*2 (S.D. Cal. Aug. 29, 2011) (“Non-parties deserve extra protection from the courts.”). The “word nonparty serves as a constant reminder of the reasons for the limitations that characterize ‘third-party’ discovery.” *Dart*, 649 F.2d at 649 (quotations omitted).

B&G’s motion should be denied. As a preliminary matter, although B&G argues that it has characterized its motion as being “further streamlined following the Parties conference”, Motion at 6:22-23, IEH has not heard many of the issues articulated in B&G’s motion as reason it seeks to now compel discovery. *See* Crowe Decl. at ¶17. Plaintiff’s motion consists of nothing more than vague assertions it thinks there are more documents (when there are not) and does nothing to describe any dispute between the parties.<sup>10</sup> Regardless, IEH after conducting a reasonably diligent inquiry into this matter has no further documents responsive to any of these categories. Moreover, as IEH has done nothing to prevent B&G from deposing its corporate

<sup>10</sup> Plaintiff has filed similarly styled briefing in the Action. Cf. Action, Dkt. 164 at 2:25-3:1, & fn. 2 (Judge Barnes finding plaintiff's briefing repeatedly insufficient because "rather than addressing each individual request with argument and analysis of why defendants' objections are without merit, plaintiff has simply provided global and general arguments. From this vague and conclusory briefing, the undersigned cannot find that plaintiff's motion should be granted."). Because most of the requests and topics stated in the motion differ from the actual language in the subpoena, IEH is providing the language from the subpoena and IEH's stated responses to the requests/topics. See Kwasniewski Decl., Exhibit H.

representative, there is no reason to compel IEH to be deposed – *it is solely B&G's fault no deposition has been had.*

#### **A. Information related to the condition of the subject products**

**Request Number 2:**

DOCUMENTS sufficient to show the condition of any SUBJECT PRODUCT YOU received for testing for acrylamide at the time you received them from April 2018 to present.

**Response:** IEH will produce responsive documents to the extent they exist and can be found through a reasonably diligent search.

IEH does log the condition of the samples it receives. That information is shown in the three excel spreadsheets IEH produced in November. IEH does not take “photographs” of its samples, nor does it have other such documentation. IEH has no further documents to produce responsive to Request 2.

## Topic 2:

The condition of any SUBJECT PRODUCT YOU received for testing for acrylamide at the time you received them.

**Response:** IEH will provide documents in its possession, to the extent they exist, which relate to receipt of the SUBJECT PRODUCT. IEH will be prepared to discuss such documents and its general procedures.

B&G makes no attempt to explain why IEH's response is improper. IEH has been prepared three times to respond to questions relating to this topic.

## Request 5:

DOCUMENTS sufficient to show the current condition of the SUBJECT PRODUCT from April 2018 to present.

**Response:** IEH will produce responsive documents to the extent they exist and can be found through a reasonably diligent search.

25 IEH does not have any of defendants' samples. They were disposed of – as is IEH's  
26 normal process – shortly after IEH conducted its testing. Crowe Decl. at ¶11. IEH has provided

1 documents relating to the product as it was received in the excel spreadsheets. IEH has no other  
2 responsive documents to produce.

3 **Topic 5:**

4 The current condition of the SUBJECT PRODUCT.

5 ***Response: IEH will be prepared to discuss its policy on disposal of testing***  
6 ***samples.***

7 B&G makes no attempt to explain why IEH's response is improper. IEH has been  
8 prepared three times to respond to questions relating to this topic.

9 **B. Information Related to "Faulty Testing"**

10 B&G does not detail what was discussed during the conference on December 20, 2024.<sup>11</sup>  
11 Be that as it may, IEH did address all of B&G's questions and explained the documents it had  
12 and those it did not. *See id.* IEH explained that it does not, in the normal course, keep track of  
13 any result which is questioned by its client and if other clients had questions regarding the testing  
14 performed for them it would be confidential to that client. *See id.* IEH also explained that if two  
15 different laboratories are provided the same product, but not the same sample, the fact that  
16 different results can be found is not surprising (as it is not the same sample). *See id.* Different  
17 boxes of the same product can have differing exposures, temperature controls, etc. which can  
18 lead to differing results. The different results do not prove either laboratories work was "faulty."  
19 IEH explained that it was not aware of any result where it tested a sample and another lab tested  
20 the same sample and the results differed. *See id.* And, IEH provided all of its results for  
21 products tested for defendants. *See id.* at ¶9. The fact that B&G wants to characterize IEH's  
22 testing as "faulty" does not mean there is evidence to show that it is. There is not.

23 **Request 8:**

24 DOCUMENTS sufficient to show YOUR quality assurance policies and  
25 procedures, including without limitation all quality assurance methods YOU

26 <sup>11</sup> This is probably due to Mr. Kwasniewski not being present at that conference. *See* Crowe Decl. at  
¶¶10-11

1 employed in connection with YOUR testing of B&G FOODS'S products for  
2 acrylamide from April 2018 to present.

3 ***Response: IEH will produce responsive documents to the extent they exist and can  
be found through a reasonably diligent search.***

4 IEH produced its Standard Operating Procedures it follows, its ANSI accreditation and its  
5 sample login procedures for its acrylamide testing. It is entirely unclear from its motion what  
6 else B&G believes it should receive.

7 **Topic 8:**

8 YOUR quality assurance policies and procedures, including without limitation all  
9 quality assurance methods YOU employed in connection with YOUR testing of  
B&G FOOD'S products for acrylamide.

10 ***Response: IEH will be prepared to discuss the testing procedures and methods  
used in connection with its acrylamide testing.***

11 B&G makes no attempt to explain why IEH's response is improper. IEH has been  
12 prepared three times to respond to questions relating to this topic.

13 **Request 13:**

14 DOCUMENTS sufficient to show YOUR policies and procedures for preventing  
15 cross-contamination of products tested for acrylamide from April 2018 to present.

16 ***Response: IEH will produce responsive documents to the extent they exist and  
can be found through a reasonably diligent search.***

17 IEH produced its Standard Operating Procedures it follows, its ANSI accreditation and its  
18 sample login procedures for its acrylamide testing. It is entirely unclear from its motion what  
19 else B&G believes it should receive.

20 **Topic 13:**

21 YOUR policies and procedures for preventing cross-contamination of products  
22 tested for acrylamide.

23 ***Response: When appropriate, IEH will be prepared to discuss the testing  
procedures and methods used in connection with the stated products.***

24 B&G makes no attempt to explain why IEH's response is improper. IEH has been  
25 prepared three times to respond to questions relating to this topic.

1 **Request 36:**

2  
3 ALL DOCUMENTS CONCERNING the industry standards for performing  
4 Proposition 65 food product testing, including ALL DOCUMENTS demonstrating  
5 your compliance with these industry standards.

6 *Response: IEH does not keep any such documents, to the extent any exist, in its*  
7 *regular course of business. IEH objects to this request to the extent it is unduly*  
8 *burdensome, overly broad and would cause IEH an undue expense to decipher such*  
9 *industry standards for all Proposition 65 food product testing. For the testing at*  
10 *issue in this matter, IEH's testing complied with ANSI standards and IEH will*  
11 *produce its accreditation for same.*

12 As explained to B&G, IEH was not employed as an expert to opine on California law. It  
13 is a testing laboratory. Although IEH is aware that its results may be used in cases involving  
14 Proposition 65, it has no documents regarding any “industry standard” nor does IEH know that  
15 one exists.

16 **Topic 7:**

17 The industry standards for performing Proposition 65 food product testing.

18 *Response: IEH objects to this request to the extent it presumes IEH is an expert on*  
19 *industry standards for Proposition 65 food testing. IEH has not been hired as an*  
20 *expert on this topic, nor is it inclined or prepared to opine on what the industry*  
21 *standards for Proposition 65 testing include, to the extent any exist. IEH will be*  
22 *prepared to discuss the testing it conducted related to the SUBJECT PRODUCT or*  
23 *its testing for acrylamide.*

24 IEH stands on its objection. It is not an expert witness nor is it in the business of opining  
25 on what is appropriate under California law relating to Proposition 65. B&G provides no reason  
26 in its motion why IEH should be compelled to provide expert witness testimony in this matter.

27 **Topics 3, 9, 10 and 12:**

28 For each of these topics, IEH stated it would be prepared to testify. *See Kwasniewski*  
29 *Decl. Exhibit H.* The only reason B&G has not received such testimony is because it cancelled  
30 the deposition three times.

1 **Request 14:**

2 DOCUMENTS sufficient to show the error rate of the methodologies YOU use to  
3 test products for acrylamide from April 2018 to present.

4 ***Response: IEH will produce responsive documents to the extent they exist and can  
be found through a reasonably diligent search.***

5 In IEH's Standard Operating Procedures for acrylamide testing, the error rate is stated.

6 **Topic 14:**

7 The error rate of the methodologies YOU use to test products for acrylamide.

8 ***Response: IEH will be prepared to discuss such rates to any extent they are kept.***

9 B&G makes no attempt to explain why IEH's response is improper. IEH has been  
10 prepared three times to respond to questions relating to this topic.

11 **Request 15:**

12 All DOCUMENTS CONCERNING any test result for acrylamide generated by  
13 YOU that YOU later learned was inaccurate from April 2018 to present.

14 ***Response: IEH objects to this request to the extent it seeks confidential information  
of any third party. IEH also objects to this request to the extent it is an undue  
burden, as IEH does not track such information in its usual course of business.***

15 As explained to B&G, after performing a reasonable diligent inquiry, IEH does not know  
16 of any such documents. Crowe Decl. at ¶11. Moreover, as IEH explained to B&G, the fact that  
17 another laboratory may reach a different result from a different sample does not show that IEH's  
18 result is "inaccurate", or that the other laboratory's result is "inaccurate". *See id.*

19 **Topic 15:**

20 Test results for acrylamide generated by YOU and YOU later learned were  
21 inaccurate.

22 ***Response: IEH objects to this topic to any extent it seeks confidential information  
of third parties. IEH further objects to this request to the extent it seeks  
information that IEH does not collect or keep track of in the normal course of  
business and thereby requests information that does not exist and/or cannot be  
determined without subjecting IEH to an undue burden.***

1 B&G makes no attempt to explain why IEH's objections are improper or why it  
2 should be made to go beyond a reasonably diligent inquiry searching for such information.  
3 As explained to B&G, after performing a reasonable diligent inquiry, IEH does not know  
4 of any such documents. *See* Crowe Decl. at ¶11.

5 **Request 16:**

6 All DOCUMENTS CONCERNING any test results from other laboratories for  
7 acrylamide in products tested by YOU.

8 ***Response:*** *IEH objects to this topic as it is vague and confusing and assumes*  
9 *IEH somehow collects laboratory test results from other laboratories on the*  
*products it previously tested.*

10 As explained to B&G, after performing a reasonable diligent inquiry, IEH does not  
11 know of any such documents. *See* Crowe Decl. at ¶11.

12 **Topic 16:**

13 Test results from other laboratories for acrylamide in products tested by YOU.

14 ***Response:*** *IEH objects to this topic as it is vague and confusing and assumes*  
15 *IEH somehow collects laboratory test results from other laboratories on the*  
*products it tests.*

16 As explained to B&G, IEH is not aware of such information and does not believe  
17 different samples are the same "product." IEH does not collect such information and cannot  
18 prepare for a deposition on laboratory results it does not have.

19 **C. Information Related to Other Products**

20 Given the nature of B&G's argument (Motion at 9:9-10:14), it is difficult to ascertain  
21 what they think they are entitled to in this category. They argue that they should receive the  
22 results of all of defendants testing from IEH; ***they already have received all such data in***  
23 ***multiple forms.*** But – the listed requests/topic relate to B&G's products not defendants other  
24 tests. To the extent they claim IEH is limiting their production to "products in the underlying  
25 state court acrylamide cases", Motion at 9:9-10, IEH had made no such objection and has no idea  
26 what B&G is referring to. Crowe Decl. at ¶20.

1 **Request 7:**

2 All DOCUMENTS CONCERNING any testing of B&G FOODS'S products for  
3 acrylamide from April 2018 to present.

4 ***Response: IEH will produce responsive documents to the extent they exist and can  
be found through a reasonably diligent search.***

5 IEH has conducted a reasonably diligent search and found no other documents relating to  
6 B&G and acrylamide, besides the testing done by defendants. IEH explained this on December  
7 20, 2023. Crowe Decl. ¶10. IEH has produced all of the testing done for defendants in multiple  
8 forms. There are no further documents to compel.

9 **Topic 6:**

10 Any testing of B&G FOOD'S products for acrylamide.

11 ***Response: When appropriate, IEH will provide documents in its possession, to the  
extent they exist, which relate to such testing. IEH will be prepared to discuss such  
documents and its testing procedures.***

12 B&G makes no attempt to explain why IEH's response is improper. IEH has been  
13 prepared three times to respond to questions relating to this topic.

14 **Request 34:**

15 All DOCUMENTS CONCERNING any testing YOU conducted on any B&G  
16 FOODS products.

17 ***Response: IEH objects to this topic to the extent it requires it to know whether the  
testing was performed on B&G FOODS products. IEH also objects to this request  
because B&G FOODS has numerous product lines that are not at issue in this  
litigation and it would be unduly burdensome for IEH to determine which possible  
brands may have been tested at its numerous laboratories. IEH will provide  
responsive documents, to the extent they exist, that it can readily determine relate  
to B&G FOODS. If plaintiff has reason to believe that additional testing was  
performed on one of its other numerous product lines, that in some fashion relate  
to this ACTION, IEH is willing to confer re the same.***

18 IEH explained that it searched for other tests conducted on B&G's products and found  
19 none additional to those conducted by defendants. IEH has produced all of defendants' test  
20 results. During the conference, B&G did not request any additional brands to be searched. B&G  
21

1 makes no justification for further fishing into IEH's other clients' documents in its motion,  
2 where it only addresses documents from defendants which have already been produced.  
3

### CONCLUSION

4 B&G's motion to compel should be denied. IEH has complied with the requests for  
5 documents and has made a corporate designee available three times for deposition. The Court  
6 should order no further discovery from IEH in this matter be allowed.  
7

8 Dated: March 25, 2024

9 /s/ David E. Crowe

10 David E. Crowe (WSBA Number 43529)  
11 Institute for Environmental Health, Inc.  
12 15300 Bothell Way NE  
13 Lake Forest, WA 98155  
14 Telephone: (206) 522-5432  
15 Email: [david.crowe@iehinc.com](mailto:david.crowe@iehinc.com)

16  
17 *Attorney for Defendant*  
18 *Institute for Environmental Health, Inc.*

### CERTIFICATE OF SERVICE

19 I certify that on March 25, 2024, I electronically filed the foregoing with the Clerk of  
20 Court using the Court's CM/ECF system, which caused a true and correct copy of the foregoing  
21 to be served upon:

<b>David Howard Kwasniewski</b> Braunhagey & Borden LLP 351 California St. 10th Floor San Francisco, CA 94104 415-599-0210 Email: <a href="mailto:kwasniewski@braunhagey.com">kwasniewski@braunhagey.com</a>	<b>Jofrey M. McWilliam</b> Byrnes Keller Cromwell LLP 1000 Second Avenue 38 <sup>th</sup> Floor Seattle, WA 98104 206-622-2000 Email: <a href="mailto:jmcwilliam@byrneskeller.com">jmcwilliam@byrneskeller.com</a>
--	--

22  
23 s/ David E. Crowe  
24 David E. Crowe